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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER AARON MARKS, Defendant and Appellant.	E047918 (Super.Ct.No. RIF136453) OPINION

APPEAL from the Superior Court of Riverside County. Richard Hanscom, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art VI, § of the Cal. Const). Affirmed.

Janice M. Lagerlof, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christopher Aaron Marks appeals from his conviction and 60-year prison sentence for one count of committing a lewd act on a child under the age of 14 by means of force or fear (Pen. Code, § 288, subd. (b)(1))[1] and two counts of aggravated sexual assault of a child under the age of 14 (§ 269, subd. (a)(1)). Specifically, defendant argues: 1) the evidence is insufficient to prove beyond a reasonable doubt that he committed the offenses; and 2) he suffered prejudice when the jury heard evidence that he owned a gun, used drugs and had been in jail. As discussed below, we affirm the judgment.

FACTS AND PROCEDURE

When C was five years old, her parents divorced and she and her mother went to live at her grandmother's house in Banning. Defendant, who is the brother of C's mother, lived at the house in a garage converted to a bedroom.

In 2006, when C was eleven years old, she told her stepmother that defendant had raped her twice when she was about five years old. C's stepmother reported this to police, after which C was examined and interviewed. While driving home from the exam and first interview, C told her stepmother "I did not tell them everything" because "it was embarrassing, disgusting" and she was scared and nervous. C was interviewed again and gave more details about the rapes.

At trial, C testified about two separate incidents. The first took place when she was in defendant's room to play a game on his computer. Defendant came into the room

[1] All further statutory references are to the Penal Code unless otherwise indicated.

and turned the stereo on loud. Defendant laid on his back on the bed, put C on the bed and told her to get on top of him. Defendant placed his hands on C's hips and told her to "go up and down." C said "no" at first but "then I think I did do it somehow. I think he conned me into doing it or something. I don't remember." C's "stomach started to hurt really bad." C could feel defendant inside her. C told defendant she wanted to stop because it hurt, but he said "no." C screamed, defendant pushed her onto the floor, and C's mother came into the room. Defendant told C's mother that C had fallen off the bed. Before C's mother came into the room, defendant told C "that if I told anybody else he was going to do it again." At some point that day or the next day, C saw blood in the toilet when she went to the bathroom. C told her mother about what happened "but she didn't do anything about it." C's mother took her to the doctor, who said C had an infection. C believed the doctor "made a police report over it."

C testified that the second incident happened when she was five or six. C was in defendant's room changing her clothes. Defendant came into the room and pushed C down. "And then he told me to get on top of him or I got on top of him or he put me on top of him. Somehow I got on top of him." C could feel defendant inside her. "It wasn't a good feeling." This second incident lasted longer than the first time. C did not remember defendant saying anything to her this time. C told her mom about this incident as well, but "She didn't do nothing."

C testified that she was scared of defendant because he talked mean to people on the phone, because she had seen drugs in his closet, and because her mother had told her stories about defendant stealing weapons. At that point the prosecutor told her to talk

about only what she knew first hand, not stories. The defense had objected to this testimony for lack of foundation,[2] but was overruled.

Finally, C testified that, when she was five or six, defendant would on multiple occasions allow other men to have sex with C in exchange for drugs. Sometimes this took place at C's grandmother's house, sometimes at a house in Cherry Valley, sometimes at another house. Once C had sex with two men at the same time. One day C talked briefly with another girl at one of the houses. "She was sad." C first reported this to her stepmother in 2008 after she and her mother drove by the house in Cherry Valley while looking for houses to buy. This jogged her memory. C did not report this to her mother because "I didn't think she'd believe me."

On cross-examination, defense counsel questioned C in detail regarding what defendant's room looked like. C remembered many details, such as the color of the bed sheets and carpet, the windows and window coverings, the placement of the closet, the television antenna, the stereo, and the computer. Defense counsel asked C to describe how she saw the drugs in defendant's closet, exactly what she saw, and how she knew it was cocaine. C stated she knew it was cocaine because she watched the television show *Cops*. Defense counsel also asked C to describe how she saw the gun in defendant's closet, what it looked like and whether she had ever seen it in defendant's hand. C answered that it was a short black gun that she saw in defendant's closet, and that she had never seen him hold it.

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[2] The defense did not object to the testimony as irrelevant, as defendant asserts on page 23 of his opening brief.

Also on cross-examination, C stated that during her first interview she had not told the female investigator that defendant had placed his penis inside her because "I was too scared to talk about everything during the first interview." C stated that she told the truth during the second interview because she was more relaxed. However, she did not tell the female investigator at that time about defendant allowing other men to have sex with her because "I don't know. I don't think I remembered that." C first told her stepmom about these incidents after she remembered them. C told an investigator from the district attorney's office about these incidents in May 2008, and stated that they happened 12 to 15 times. Sometimes defendant would pick C up from school and take her to the other houses, but C did not remember much about that.

C remembered that she had told one of her best friends about at least one of the incidents, but had told no one else. The sexual abuse stopped when she was nine or ten years old.

C's stepmother testified briefly about the ride back from the first interview when C told her she had not told the interviewer everything, because "it was embarrassing, disgusting" and she was scared and nervous.

The pediatric sexual assault nurse examiner testified that she had performed a sexual assault exam on C. The results of the exam were consistent with what C had reported in that the hymen and been stretched and damaged, but had partially healed. On cross-examination, the nurse examine testified that the exam did not identify what had caused the damage to C's hymen, and that it could have been caused by a toy or a flashlight, but not a tampon.

C's 19-year-old cousin Jonathan testified that defendant had raped him on two separate occasions when he was five years old and that the assaults had taken place in defendant's bedroom at his grandmother's house. Jonathan cried and told defendant to stop, but defendant would not. Defendant told Jonathan that if he said anything, defendant would hurt him. Jonathan stated that he was afraid of defendant "Because I know he went to jail before and I didn't know . . . ." At that point defense counsel objected and motioned to strike that statement from the record. The trial court sustained the objection, struck the statement from the record, and admonished the jury to disregard it. Jonathan moved out of his grandmother's home when he was seven years old. Jonathan did not tell anyone about the rapes until 2002 when he was thirteen years old. He told his mother, who then took him to be interviewed by police in June of 2002 and again in October of 2002. Jonathan was not aware that the police had taken any action against defendant as a result of these reports. Jonathan had no further contact with law enforcement about this matter until 2006.

The investigating detective testified that he witnessed C's forensic interview from behind a one-way mirror. He testified about C's demeanor during the interview, and stated that she was "kind of shy, kind of timid," that "she cried a couple of times," and that she thought she was at fault for the incidents.

The defense called Dr. Paul Sinkhorn, an obstetrician/gynecologist. Dr. Sinkhorn examined the reports, diagrams and photographs of the forensic examination. He testified that there was no acute, recent injury to C's hymen, but that the photographs are "consistent with a hymen that has been stretched or torn." Dr. Sinkhorn stated his

opinion that there "could be multiple reasons" for the injury, including tampons as "a possibility." It was impossible to definitively determine from the pictures and exam what has caused the injury. In particular, a sexual assault would have caused damage to the vulva, and the vulva was not shown in these pictures.

C's mother testified that she and C had lived at her mother's home in 1999 and 2000, and the defendant lived there also. Mother did not recall defendant ever picking up C from school or daycare. In March of 1999, just before C turned four years old, she told her mother that a stranger had touched her "down below" and so mother took C to a doctor. Mother denied ever hearing C scream and finding her on the floor of defendant's bedroom. Mother never noticed any blood on C's clothing, never saw defendant touch C inappropriately and never saw C going into a room alone with two men. C never complained to her about defendant or about any unusual bleeding, and never mentioned having gone with defendant to a house in Cherry Valley. On cross-examination, C's mother testified that C would often spend the night at the grandmother's house even after they had moved out of the home with C.

On January 21, 2009, the jury found defendant guilty of all three counts. The trial court found true the allegation that defendant had a prior strike conviction for robbery (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1).

On February 27, 2009, the trial court sentenced defendant to a total term of 60 years to life in prison as follows: fifteen years each on counts two and three, doubled for the strike prior. The court imposed a concurrent sixteen-year term on count one. This appeal followed.

DISCUSSION

1. *Sufficiency of the Evidence*

Defendant first argues that insufficient evidence supports the jury's verdicts. When a defendant contends that the evidence is insufficient to support a conviction, the test on appeal is whether there is substantial evidence, i. e., evidence that is reasonable, credible, and of solid value, to support the conclusion of the trier of fact that the defendant is guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In making this determination, we view all evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Johnson,* at p. 576.)

The People argued at trial that defendant committed a lewd act on a child under age fourteen by force or fear and two counts of aggravated child rape. Defendant does not challenge any particular element of these crimes. Rather, defendant argues that C simply was not credible and that the other evidence presented does not support her version of events.

C testified that defendant raped her on two separate occasions. C described both incidents in detail, and stated that defendant told her not to tell anyone or he would do it again. The pediatric sexual assault nurse examiner testified that the results of the physical exam were fully consistent with C's account. The physician who testified for the defense affirmed that C's "hymen . . . appears to have been stretched or broken in some way, and the hymen has healed" before stating that he was unable to determine from the exam photographs exactly what caused the stretching or tearing. Finally, C's

cousin Jonathan testified that defendant also raped him on two separate occasions in the same room of the same house, when he was the same age, five, as C was when defendant raped her.

Defendant did not present any evidence to suggest that either C or Jonathan were in the habit of lying or had any motive for colluding against him. On this appeal, defendant mainly points to minor inconsistencies in C's testimony and to the fact that she did not initially report the full details of the assaults. Because the jury's function is to assess the credibility of witnesses (*People v. Friend* (2009) 47 Cal.4th 1, 41) and because there was no evidence that directly contradicted either C's or Jonathan's testimony, we conclude that substantial evidence supports the jury's verdict.

2. *Admission of Other Crimes Evidence*

Defendant also argues he was prejudiced when the jury heard evidence that he owned weapons, used drugs and had previously been in jail.

"'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.] Evidence may be excluded under Evidence Code Section 352 if its probative value is 'substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citation.] 'Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value.' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.)

Weapons

The jury first heard that defendant owned weapons when C began to testify that she was afraid of defendant because "My mom's told me stories that he stole weapons . . . ." At that point the prosecutor told C not to talk about stories and the testimony moved onto another subject. Defense counsel did not object and the trial court made no rulings. Defense counsel asked C about it on cross-examination in order to elicit her testimony that, although she had seen a weapon in defendant's closet, he had never threatened her with it and she had never even seen him holding it. In addition, the pediatric sexual assault nurse examiner testified that she wrote in her report "Child saw guns in closet and was afraid. He never pointed it at her." Defense counsel did not object to this testimony.

As the People point out, the defense forfeited this claim by failing to object on the ground of relevance and then by asking C questions about the weapon(s) on cross-examination. (*People v. Marlow and Coffman* (2004) 34 Cal.4th 1, 64.) In any case, the evidence that C knew defendant possessed weapons is highly relevant to whether C was afraid of defendant, both for the element of "force or fear" in count one, and to explain why she did not tell anyone about the rapes until years later.

Drugs

The jury heard from C that she was afraid of defendant because she had seen cocaine in his closet. Defense counsel did not object to this testimony. On cross-examination, defense counsel asked C to describe defendant's bedroom, including the closet in which she had seen the cocaine:

"Q [DEFENSE COUNSEL]: Is this the same closet that you earlier testified to as being a closet where you saw something like a white powder or a white salt?

"A Yes.

"Q [DEFENSE COUNSEL]: In a hole in the closet?

"A (Witness nodding head.)

"Q [DEFENSE COUNSEL]: The closet had two doors on it? Or what did the closet look like?

"A It had two doors, and you slide them. Like sliding the doors.

"Q [DEFENSE COUNSEL]: Where was the hole in the closet?

"A In the ceiling.

"Q [DEFENSE COUNSEL]: In the ceiling of the closet?

"A Yeah.

"Q [DEFENSE COUNSEL]: And then up in that hole there was something?

"A Yes.

"Q [DEFENSE COUNSEL]: What was up in that hole?

"A Cocaine.

"Q [DEFENSE COUNSEL]: How do you know it was cocaine?

"A I just know. I watch *Cops*. I don't know."

As with the weapons evidence discussed above, the defense never objected on the ground of relevance and in fact questioned C about the drugs on cross-examination. Thus, defendant waived any right to challenge the admission of this evidence on appeal.

Jail

The jury heard Jonathan testify that he was afraid of defendant because defendant had been in jail before. The defense objected. The trial court granted the defense motion to strike this testimony and later instructed the jury to disregard this information. We presume that the jurors followed the trial court's instructions, and thus defendant was not harmed by this disclosure. (*People v. Osband* (1996) 13 Cal.4th 622, 687.)

DISPOSITION

The judgment of the trial court is affirmed.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

MILLER
J.